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February 18, 2019

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: The State of South Carolina v Derek Maner
Case Number: 2013-CP-03-0159

Dear Ms. Kitchings:

Enclosed for filing is a notice of appeal in the above case. Also are the following:

1. Proof of service of the notice of appeal on the respondents;
2. A copy of the Order of dismissal of Appellant's PCR which is to be challenged on appeal (Exhibit 1) and a copy of the Consent Order granting belated review (Exhibit 2).
3. Filling fee of $250.00.

Sincerely,

Deborah J. Butcher

CC:
The Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

Office of Attorney General
AllenWilson
Post Conviction Relief Division – 4th and 15 Judicial Circuits
Ruston W. Neely, Esquire
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Columbia, South Carolina 29201
Attorney for Respondent

Allendale County Clerk of Court
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P.O. Box 126
Allendale, South Carolina 29810-0126

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FEB 19 2019
S.C. SUPREME COURT

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FEB 18 2019
S.C. SUPREME COURT

Tristan M. Shaffer
225 Columbia Ave.
Chapin, South Carolina 29036

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THE STATE OF SOUTH CAROLINA
In The Supreme Court of South Carolina

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas

Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-03-0159

The State of South Carolina, Respondent,

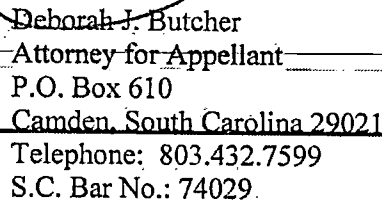
v.

Derek Maner, Appellant.

NOTICE OF APPEAL

Derek Maner appeals the order and judgment of the Honorable Diane S. Goodstein dated September 25, 2017. Exhibit 1. Also included is Consent Order Granting Belated Review. Exhibit 2.

On February 11, 2019 Appellant received notice by email of entry of the Consent Order Granting Belated Review filed January 22, 2019. On February 18, 2019 Appellant received written notice of the Consent Order Granting Belated Review filed January 22, 2019.



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February 16, 2019
Camden, South Carolina

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FEB 18 2019
S.C. SUPREME COURT

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S.C. SUPREME COURT

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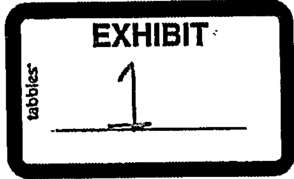

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ELAINE SABB
CLERK OF COURT
ALLENDALE COUNTY, S.C.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ALLENDALE) THE FOURTEENTH JUDICIAL CIRCUIT

Derek Maner, #333244) Case no. 2013-CP-03-0159

Applicant,)

v.) **ORDER OF DISMISSAL**

State of South Carolina,)

Respondent.)

Applicant filed an application for post-conviction relief (PCR) on September 12, 2013. This Court convened an evidentiary hearing into the matter on June 9, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by Deborah Butcher, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Byron E. Gipson (Counsel), Esquire, and Applicant were present and testified. This Court had the opportunity to listen to their testimony and rule on their credibility. This Court also had before it a copy of the trial transcript, the records of the Allendale County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter. This Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Allendale County Clerk of Court. Applicant was indicted at the August 2008 term of the Allendale County Grand Jury for murder (2008-GS-03-0135).

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Applicant proceeded to trial and was found guilty on February 12, 2009. Applicant was sentenced by the Honorable Perry M. Buckner to confinement for life.

Applicant filed a timely Notice of Appeal. His appeal was perfected by Susan Hackett, Esquire, of the Office of Appellate Defense. Applicant's conviction and sentence were affirmed by the Court of Appeals. State v. Maner, 2012-UP-550 (S.C. Ct. App. filed October 10, 2012). The Remittitur was issued on October 28, 2012.

II. ALLEGATIONS

Applicant alleged the following grounds in his application:

1. Ineffective Assistance of Trial Counsel
    a. Failure to object to testimony the victim was a good student, had no problems at school, and was suitable for college;
    b. Failure to object to Investigator Silvaggio's testimony on the basis it was victimology;
    c. Failure to object to Deputy Johnson's claim there would have been skid marks if car was put in park while traveling 50 mph;
    d. Failure to object to testimony concerning Derek Maner's brother's car by James Hutton;
    e. Failure to object to chain of custody for DNA reports on grounds State did not produce the chain in a timely manner;
    f. Failure to object to testimony regarding Jessica Bradley's conversation with Tony Carter on the basis of hearsay;
    g. Failure to have expert testimony of Dr. Michael Ward held in camera and failure to object to his testimony which was outside his area of expertise;
    h. Failure to object to testimony of Madoree Pipkins regarding jewelry on the basis of relevancy;
    i. Failure to call Applicant's mother as a witness.

III. SUMMARY OF FACTS

Ericka Bradley (the victim) was last seen on November 6, 2006. ROA. 78, 80, 83, 87, 88, 90, 311. She clocked-out of work the night of November 6, 2006, at 10:45 p.m. She was sent home as a result of horseplay with another employee. ROA. 545, 467, 468. Victim's cousin, Peter Tony Carter, picked her up from work to take her to Applicant's home where she lived. ROA. 20-21, 24, 25. Applicant was her boyfriend and the father of her then six-month-old son.

ROA. 79-80. Applicant was not at home when they arrived. The victim and Carter returned to his vehicle to ride around town. Seeing Applicant in his car, Carter and victim "flagged" him and pulled up beside Applicant at a stop sign. ROA. 26, 545-546. Applicant admitted at trial he was cheating on victim with another woman at the time. The victim apparently suspected this and confronted Applicant after finding him. ROA. 548. The victim first requested Applicant open the back of his car. She then took out a baseball bat and attacked him. Applicant did not become violent at that time. After approximately thirty minutes of talking, the situation cooled, and the victim asked Carter to leave her with Applicant. ROA. 26-28, 546-548.

Applicant testified he and the victim were on the way to his home when she "started getting agitated again and getting mad again." ROA. 548. Applicant suggested they go see the other woman – by his admission "trying to be slick" or "bluff" his way through the confrontation. ROA. 548-550. According to Applicant, victim began to cuss and hit him. ROA. 549-550. He maintained the victim "threw [his moving] car in park" and when the car stopped, she left. ROA. 550-551. Again, according to Applicant, he tried to get the victim to get back into the car. She refused and he left. ROA. 552. Cell phone records confirmed Applicant placed a call to Carter that night at 11:57 p.m. ROA. 316. Carter testified Applicant told Carter "she wouldn't get back in the car" and he left her near a local store. Applicant asked Carter to go get her. ROA. 299. However, Carter could not find the victim. ROA. 299-300. The victim was not heard from or seen by her family again, nor did she show up at school or work, or collect her paychecks. ROA. 98, 132, 135, 195, 196, 204, 208, 414-415, 463, 466. The only portions of the victim's body recovered were blood and tissue – more specifically, "pieces of skeletal muscle and peripheral nerve"– from the undercarriage of Applicant's vehicle. The DNA testing confirmed the tissue was consistent with a "child of Jackie and Henry Bradley," victim's parents. ROA.

383-385, 426-427, 430. Dr. Michael Eugene Ward, a forensic pathologist and Chief Medical Examiner for Greenville County, testified his opinion was "the body who was run over by this vehicle would likely receive significant bodily injury which would cause great bodily harm or possibly death." ROA. 431.

Madoree Pipkins' testified concerning a phone call Applicant made to her from jail. Tr. 259, Vol. III. The phone call was also played for the jury. Tr. 259. Applicant told her to go and retrieve jewelry that was hidden in a flower pot. Tr. 259. He told her to clean the jewelry off and take it to California with her and never tell anyone about it. Tr. 259. Pipkins went to the described location, but claimed she was never able to find the jewelry. When she was unable to find the jewelry she told Applicant and Applicant told her to go back and try again. Tr. 246, Vol. III. The State argued this testimony was evidence Applicant was disposing of jewelry the victim was wearing.

Deputy James Hutto testified he stopped Applicant's brother on a routine traffic stop. Tr. 256, Vol. II. He testified Applicant's brother was nervous and the backseat of his vehicle was missing. Tr. 257. Several days before the brother's court appearance for the traffic ticket, he had the still-functional vehicle destroyed in a car compacter. Tr. 258. The State argued this testimony was circumstantial evidence indicating suspicious activity of Applicant and Applicant's brother involving the disposal of potential evidence.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that Applicant has failed to satisfy his burden to prove Counsel was deficient or that he was prejudiced by Counsels' alleged deficiencies. Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief,

Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668. The proper measure of performance is whether Counsel provided representation within the range of competence required in criminal cases. Id.

This Court finds Applicant has failed to satisfy his burden to prove Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by Counsel's alleged deficiencies. This Court finds Applicant's testimony lacked credibility and Counsel's testimony was credible. This Court finds Counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and preparing for trial. This Court finds Counsel rendered adequate assistance and exercised professional judgment in his decisions at trial. This Court dismisses Applicant's application for the reasons set out below:

A. Ineffective Assistance of Counsel

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 1989. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsels' deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." Id, at 117-18, 386 S.E.2d at 625. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

1. Failure to object to testimony the victim was a good student, had no problems at school, and was suitable for college.

Counsel was not deficient for not cross-examining the victim's mother or Investigator Paul Silvaggio on the victim's school record. Silvaggio testified he was tasked with determining whether the victim was missing or had voluntarily moved somewhere else. Tr. 170, Vol. II. During his investigation, he spoke with teachers at the victim's school and determined she was a good student, who consistently went to class, and was "college bound." Tr. 171, Vol. II. The victim's mother, Jackie Bradley, also testified she was a good student. Tr. 212, Vol. II. This Court finds Bradley's and Silvaggio's testimony were appropriate and not objectionable. "[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). The testimony concerning the victim's school attendance was purely to establish why the Sheriff's office began a homicide investigation.

Applicant's assertion Counsel should have attacked the victim's school record and her lack of suitability for college is without merit. Counsel testified he believed the best trial strategy was not to personally attack the deceased victim at trial. This Court finds Counsel's trial strategy imminently reasonable. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Counsel testified attacking a deceased victim's character, when it

was merely used to explain why the Sheriff's Office began a missing person investigation, would certainly have been viewed poorly by a jury. This Court finds Counsel's decision not to attack the victim's school record was sound trial strategy. Therefore, this Court finds Counsel was not deficient for not attacking the victim's school record.

This Court also finds Applicant failed to prove he was prejudiced by the testimony concerning the victim's school record such that there was a reasonable probability the result of the trial would have been different. Silvaggio's and Bradley's testimony concerning the victim's school grades was not material to Applicant's guilt or innocence. The testimony merely served to set the scene for the investigation and show the victim was missing.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting to the testimony concerning the victim's school record. This Court also finds Applicant failed to prove Counsel's decision not to cross-examine witnesses concerning the victim's school record prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

2. Failure to object to Investigator Silvaggio's testimony on the basis it was victimology.

Applicant asserts Silvaggio's testimony regarding the victim's grades, attendance, and college eligibility was inappropriate victimology. This claim is without merit. Silvaggio was not qualified as an expert witness in the field of victimology nor did he testify as a victimologist. Silvaggio's testimony concerning 'victimology' was only to show the reasoning behind law enforcement's decision on whether to begin a homicide investigation or a missing person investigation. In a reversed opinion, the Court of Appeals found the expert field of victimology was not a scientific area of expertise. "[C]rime scene analysis and victimology are nonscientific areas of expertise." State v. Tapp, 387 S.C. 159, 167, 691 S.E.2d 165, 169 (Ct. App. 2010)

(reversed on other grounds). However, Silvaggio was not qualified as nor purported to be an expert in victimology. Silvaggio's testimony, concerning his investigation into the victim's habits and background, merely served to set the scene for the investigation. The testimony showed why law enforcement believed the victim was dead or under duress instead of missing of her own accord. "I then devised, with law enforcement, a plan as to how to further approach the investigation and further determine whether Ericka Bradley was missing on her own accord or missing under distress or if something had tragically happened to Ericka Bradley." Tr. 162.

Silvaggio's testimony was not expert testimony. Silvaggio's testimony was entirely to explain why the homicide investigation was undertaken by the Sheriff's office. "[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). This Court finds Silvaggio's testimony concerning his missing persons investigation was appropriate and not objectionable. Therefore, this Court finds Counsel was not deficient for failing to object to Silvaggio's testimony on the basis that it was victimology.

Applicant failed to prove he was prejudiced by the testimony concerning the victim's school record. Silvaggio's testimony concerning the victim's background and school record merely served to set the scene for the investigation and show the victim was missing involuntarily. This Court finds it unreasonable to conclude the jury would have found Applicant not guilty if the victim's school record had been objected to or attacked via cross-examination.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting to Silvaggio's testimony on the basis of victimology. This Court also finds Applicant failed to prove Counsel's decision not to object prejudiced Applicant under the Strickland standard. Accordingly, this Court denies and dismisses this allegation.

3. <u>Failure to object to Deputy Johnson's claim there would have been skid marks if car was put in park while travelling 50 mph.</u>

Counsel objected to Deputy Richard Johnson's testimony, concerning potential damage that could have been done to Applicant's car, on the basis that the question called for speculation. Tr. 28, Vol. III. The trial court sustained Counsel's objection. Tr. 28, Vol. III. Before Counsel objected, Johnson opined he would expect skid marks on the road if a car was put into park while travelling 50 mph. Tr. 28, Vol. III. Applicant contends Johnson's opinion he would expect skid marks if a car was put into park while traveling 50 mph was improper and prejudiced Applicant.

Johnson's opinion did not require special knowledge, but rather is common sense. See Estate of Thompson v. Kawasaki Heavy Indus., Ltd., 933 F. Supp. 2d 1111 (N.D. Iowa 2013) (holding a police officer could give lay testimony regarding skid marks on road). "Lay witnesses are permitted to offer opinion testimony when such testimony is rationally related to the witness's perception, does not require special knowledge, and may assist the jury's understanding of the witness's testimony." State v. Blurton, 342 S.C. 500, 509, 537 S.E.2d 291, 296 (Ct. App. 2000) (reversed on other grounds). The Court of Appeal's opinion addressed Silvaggio's testimony on Applicant's direct appeal. No. 2012-UP-550. The Court of Appeals affirmed Applicant's conviction and cited State v. Williams, 321 S.C. 455, 464, 469 S.E.2d 49, 54 (1996) ("A natural inference based on stated facts is not opinion evidence. Where the distinction between fact and opinion is blurred, it is often best to leave the matter to the discretion of the trial judge."). Applicant raised this issue in his direct appeal. This issue was addressed on its merits and affirmed by the Court of Appeals. "Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings." Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975). "Issues that

could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel." Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993). This Court finds this issue was addressed on direct appeal and, therefore, is inappropriate for PCR. This Court also finds Johnson's testimony was not opinion evidence and was proper lay testimony.

Further, Johnson made the allegedly improper statement while testifying concerning questions he asked Applicant. Tr. 28, Vol. III. Johnson was not testifying for the truth of the matter asserted. Counsel properly objected when Johnson attempted to explain the reasons behind his questions. At the evidentiary hearing, Counsel testified he objected when he believed the officer's testimony was going too far. Counsel also testified he did not think it necessary to object to every objectionable issue and he believed a jury would view constant objections with disfavor.

This Court finds Applicant also failed to prove Johnson's testimony was prejudicial. The evidence on which the State's case rested was the victim's DNA on the undercarriage of Applicant's vehicle. Tr. 385-388. The identification of the skeletal and nerve tissue DNA as the victim's was damning to Applicant's assertion of innocence. Applicant's assertion he dropped the victim off and never saw her again was belied by the blood on the undercarriage of his vehicle. The assertion the blood came from his brother running over a dog was debunked by the DNA evidence. This Court finds it unreasonable to conclude the jury would have found Applicant not guilty if Johnson's question to Applicant concerning skid marks had been objected to and excluded.

Accordingly, this Court finds this issue was addressed on direct appeal and, therefore, is inappropriate for PCR. This Court also finds Applicant failed to prove Counsel was deficient for

not objecting to Johnson's testimony concerning the lack of skid marks. This Court also finds Applicant failed to prove Johnson's testimony concerning the lack of skid marks was so prejudicial that there was a reasonable probability the result of the trial would have been different had it been curtailed. Accordingly, this Court denies and dismisses this allegation.

4. Failure to object to James Hutto's testimony concerning Applicant's brother's car.

Deputy James Hutto's testimony was relevant and appropriate circumstantial evidence in the State's case. Applicant alleges Counsel should have objected to Hutto's testimony on the basis it was not relevant. Hutto testified he stopped Applicant's brother on a routine traffic stop. He testified Applicant's brother was nervous and the backseat of his vehicle was missing. Several days before the brother's court appearance for the traffic ticket, he had the still-functional vehicle destroyed in a car compacter. Counsel objected to Hutto's testimony on multiple occasions when he attempted to testify concerning hearsay statements of Applicant's brother. Tr. 257-258, Vol II. The State presented Hutto's testimony concerning his personal experiences and observations. The State used that circumstantial evidence to present a factual theory of how the victim's body was disposed to the jury. Tr. 420-421, Vol. III. This Court finds the evidence was relevant and proper for the jury's consideration. Counsel properly argued the jury should give it very little weight and consideration. This Court finds any objection by Counsel would have been overruled. Therefore, this Court finds Counsel was not deficient for failing to object.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for failing to object. This Court also finds Applicant failed to prove he was prejudiced by Hutto's testimony such that there was a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

5. Failure to object to the chain of custody based on the lack of timeliness by which the State produced it.

The State produced a certified SLED chain of custody to Counsel. Tr. 30, Vol. I. Counsel made a pre-trial motion to suppress the DNA evidence based on the chain of custody. Tr. 28-29, Vol. I. Counsel also extensively objected to the SLED reports, based on the chain of custody. Tr. 117, 120, 165-166, Vol. III. This Court finds Counsel appropriately objected to the chain of custody where he had a valid reason to do so. This Court finds Counsel adequately objected and defended his client where he thought there were weaknesses in the chain of custody. Counsel's arguments against the chain of custody were cogent and specific. Tr. 30-31, Vol. I.

This Court also finds Counsel had sufficient time to review the chain of custody after the State produced the document. Counsel testified he had enough time to review the document and felt prepared. The testimony elicited by a witness for a chain of custody witness is uncomplicated. "[W]e have consistently held that the chain of custody need be established only as far as practicable, and we reiterate that every person handling the evidence need not be identified in all cases... The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011). "Although it is the obligation of the prosecution to establish the chain of custody, this does not mean that everyone who laid hands on the evidence must be called. Indeed, gaps in the chain of custody normally go to the weight of the evidence rather than its admissibility." State v. Brockmeyer, 406 S.C. 324, 341, 751 S.E.2d 645, 654 (2013) (internal cites omitted).

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for failing to object to the chain of custody on the basis of timeliness. Accordingly, this Court denies and dismisses this allegation.

6. Failure to object to testimony regarding Jessica Bradley's conversation with Tony Parker on the basis of hearsay.

Counsel objected to Jessica Bradley's conversation with Tony Parker on the basis that it was hearsay. Tr. 154, Vol. III. Therefore, Applicant's allegation Counsel should have objected on the basis of hearsay is without merit. The trial court overruled Counsel's objection and stated the statements were not hearsay because they did not allege the truth of the matter asserted. Tr. 154, Vol. III. Therefore, Applicant could have raised this issue on direct appeal. "Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel." Drayton v. Evatt, 312 S.C. at 9, 430 S.E.2d at 520. This Court finds Counsel properly objected and, therefore, Applicant could have raised this ground on direct appeal. Therefore, this issue is not proper for PCR review.

Counsel properly objected. Therefore, Counsel's actions were not deficient. After the trial court overruled Counsel's objection, Counsel thoroughly cross-examined Bradley concerning the statements. Tr. 156-159, Vol. III. This Court finds further objections by Counsel would have been futile because the trial court had already ruled on the issue. After objecting, he appropriately cross-examined Bradley on the conversation and called her credibility into question. Tr. 156-159.

Further, Applicant failed to prove he was prejudiced by the conversation between Bradley and Parker. The conversation was merely one piece of additional circumstantial evidence. This Court finds it unreasonable to conclude the jury would have found Applicant not guilty if the conversation between Bradley and Parker had been suppressed. Therefore, this Court finds Applicant has failed to show how the conversation prejudiced him under the Strickland standard.

This Court finds Counsel properly objected and preserved this issue for direct appeal. Accordingly, this issue is not appropriate for PCR and must be dismissed. Further, Applicant failed to prove Counsel was deficient. This Court also finds Applicant failed to prove he was prejudiced by the conversation such that there was a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

7. Failure to have the testimony of Dr. Michael Ward held in camera and failure to object to his testimony, which was outside his area of expertise.

This Court finds Dr. Michael Ward's testimony was proper and within the bounds of his qualification as an expert in forensic pathology. Tr. 181, Vol. III. This allegation is without merit. This Court also finds Dr. Ward's reliance on the documents of other experts was proper in forming his own opinions. Tr. 191, Vol. III. Applicant alleges Counsel should have objected to Dr. Ward's testimony as outside his area of expertise. "[A]n expert witness may state an opinion based on facts not within his firsthand knowledge.... He may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions." Dawkins v. Fields, 354 S.C. 58, 64–65, 580 S.E.2d 433, 436 (2003). Further, Counsel extensively cross-examined Dr. Ward and attempted to discredit his knowledge of Applicant's case. Tr. 187-195, Vol. III. Dr. Ward testified he had been qualified as an expert witness in forensic pathology well over a hundred times. Tr. 181, Vol. III. Therefore, this Court finds Applicant failed to prove Counsel's decision not to object to Dr. Ward's testimony was unreasonable under professional norms.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for failing to object to Dr. Ward's testimony. Accordingly, this Court denies and dismisses this allegation.

8. Failure to object to Madoree Pipkins' testimony regarding the jewelry on the basis of relevancy.

It was properly the jury's providence to determine the weight of the jewelry as evidence of Applicant's guilt. "[I]f the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect. Rule 403, SCRE. Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate." State v. Council, 335 S.C. 1, 20–21, 515 S.E.2d 508, 518 (1999).

Madoree Pipkins' testified concerning conversations she had with Applicant while he was in jail. Tr. 259, Vol. III. Applicant told her to go and retrieve jewelry that was hidden in a flower pot. Tr. 259, Vol. III. He told her to clean the jewelry off and take it to California with her and never tell anyone about it. Tr. 259, Vol. III. Pipkins went to the described location, but claimed she was never able to find the jewelry. Tr. 246, Vol. III. When she was unable to find the jewelry she told Applicant and Applicant told her to go back and try again. Tr. 246, Vol. III. The State used the jewelry to present a factual theory that Applicant actively attempted to conceal evidence. Tr. 424, Vol. III. The State introduced pictures of victim wearing jewelry. Tr. 361, Vol. III. The State made arguments regarding the evidential value of the jewelry, as circumstantial evidence. Counsel argued the evidentiary weight of the jewelry was minimal because the State's link between the jewelry and the victim was tenuous. Tr. 408, Vol. III. Further, Applicant testified at trial and explained his version of where the jewelry originated. Tr. 361-363, Vol. III. At the evidentiary hearing, Counsel testified he told Applicant not to speak with anyone, other than Counsel, on the phone. Counsel testified the phone calls sounded very suspicious, but he believed the jail calls were admissible. This Court agrees with Counsel's assessment the jail calls were admissible.

Per the introduced audiotape, Applicant was fully aware his jail calls were being recorded and could be used against him. Tr. 259, Vol. III. This Court agrees the jail calls were statements against Applicant's own interest under Rule 804(b)(3). This Court finds the State's presentation of the jewelry as circumstantial evidence was not more prejudicial than probative under a Rule 403 analysis. Therefore, this Court finds Counsel was not deficient for failing to object to the admissible conversations between himself and Pipkins.

Applicant failed to prove he was prejudiced by Pipkins' testimony. Pipkins' testimony was merely one piece of additional circumstantial evidence. Further, Applicant provided an explanation for the jewelry during his testimony. Tr. 361-363, Vol. III. This Court finds it unreasonable to conclude the jury would not have found Applicant guilty without Pipkins' testimony. Therefore, this Court finds Applicant has failed to show how the introduction of Pipkins' conversation prejudiced Applicant under the Strickland standard.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting to Pipkins testimony as a witness. This Court also finds Applicant failed to prove he was prejudiced by Pipkins' testimony such that there was a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

9. Failure to call Applicant's parents as witnesses.

Applicant asserts Counsel should have called his parents as witnesses to testify Applicant did not have blood on his clothes when he arrived home. At the evidentiary hearing, Applicant's mother testified he came home around 1 a.m. the night the murder took place. She also testified she did not see blood on his clothing. She testified she was willing to testify at trial if Counsel thought he needed her. Applicant's mother's testimony did not account for Applicant's whereabouts at the time of the murder. Therefore, she was unable to provide Applicant with an

alibi. Applicant's father did not testify at the evidentiary hearing. "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." State v. Glover, 318 S.C. 496, 498–499, 458 S.E.2d 538, 540. Therefore, this Court finds any prejudice derived from Counsel's failure to call Applicant's father as a witness is purely speculative.

Counsel testified he spoke with Applicant and his mother extensively about whether she should testify. Counsel testified Applicant did not want his mother called to testify and his mother did not wish to testify. This Court finds Applicant's mother's testimony that Applicant did not have blood on his clothes the night of the murder would have been insignificant. Exculpatory testimony from a defendant's own mother lacks credibility. Further, the State asserted Applicant ran the victim over with a car, which would not have caused Applicant's clothes to become bloodied. Therefore, Counsel was not deficient for choosing not to call Applicant's mother where neither he nor his mother wished for her to testify and her testimony was not pivotal to Applicant's case. Applicant has also failed to prove his mother's testimony could have reasonably changed the result of the trial.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for failing to call Applicant's mother as a witness. This Court also finds Applicant failed to prove he was prejudiced by her failure to testify under the Strickland standard. Accordingly, this Court denies and dismisses this allegation.

VI. CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant, Derek Maner, has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

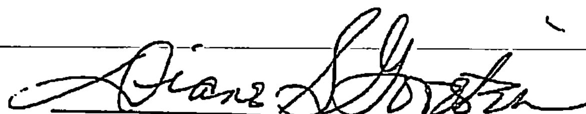
This Court notes Applicant must file and serve a notice of appeal within thirty 30 days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 1991, Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1g, SCRCP, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

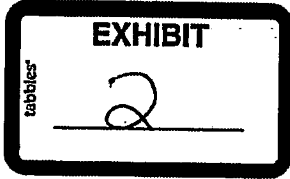
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 25 day of September, 2017.



DIANE S. GOODSTEIN
Presiding Judge
14th Judicial Circuit

St. George, South Carolina



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ELAINE SABB
CLERK OF COURT
ALLENDALE COUNTY, S.C.

STATE OF SOUTH CAROLINA COUNTY OF ALLENDALE	)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Derek Maner, #333244, Applicant,	)	2018-CP-03-0165
v.	)	**CONSENT ORDER GRANTING BELATED REVIEW PURSUANT TO AUSTIN V. STATE**[1]
State of South Carolina, Respondent.	)	

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on August 27, 2018. Applicant is represented by Deborah J. Butcher, Esquire. Respondent is represented by Assistant Attorney General Christian Saville of the South Carolina Attorney General's Office.

#1
PmB

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Allendale County Clerk of Court. Applicant was indicted at the August 2008 term of the Allendale County Grand Jury for murder (2008-GS-03-0135). Applicant proceeded to trial before the Honorable Michael G. Nettles and was found guilty on February 12, 2009. Byron E. Gipson, Esquire, represented Applicant. Judge Nettles sentenced Applicant to life imprisonment for murder.

Applicant filed a timely notice of appeal. His appeal was perfected by Susan Hackett, Esquire, of the Office of Appellate Defense. Applicant's conviction and sentence were affirmed

[1] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

by the Court of Appeals. State v. Maner, 2012-UP-550 (Ct. App. filed October 10, 2012). The remittitur was issued on October 28, 2012.

2013-CP-03-0159

Applicant filed his first application for post-conviction relief on September 12, 2013, in which he alleged the following grounds for relief:

1. Ineffective Assistance of Trial Counsel
   a. Failure to object to testimony the victim was a good student, had no problems at school, and was suitable for college;
   b. Failure to object to Investigator Silvaggio's testimony on the basis it was victimology;
   c. Failure to object to Deputy Johnson's claim there would have been skid marks if car was put in park while traveling 50 mph;
   d. Failure to object to testimony concerning Derek Maner's brother's car by James Hutton;
   e. Failure to object to chain of custody for DNA reports on grounds State did not produce the chain in a timely manner;
   f. Failure to object to testimony regarding Jessica Bradley's conversation with Tony Carter on the basis of hearsay;
   g. Failure to have expert testimony of Dr. Michael Ward held in camera and failure to object to his testimony which was outside his area of expertise;
   h. Failure to object to testimony of Madoree Pipkins regarding jewelry on the basis of relevancy;
   i. Failure to call Applicant's mother as a witness.

#2 PnB

An evidentiary hearing into the matter was convened on June 9, 2017, at the Beaufort County Courthouse before the Honorable Diane Schafer Goodstein. Applicant was present at the hearing and represented by Deborah J. Butcher, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Judge Goodstein denied and dismissed Applicant's application with prejudice by an order filed on October 11, 2017. As evidenced by the attached affidavit from Ms. Butcher, Ms. Butcher's office received the order on October 31, 2017, but the order was not placed before Ms. Butcher. On December 6, 2017, Ms. Butcher received an email from Tristan Shaffer, Esquire, who was previously relieved, about the order of dismissal. Ms. Butcher called the Court and was informed Ms. Shaffer was actually still

the attorney of record and Ms. Butcher could not file an appeal on behalf of the Applicant. According to Ms. Butcher's affidavit, she assured the Applicant they would file an appeal from his PCR dismissal and he did not waive his right to do so.

II. ALLEGATIONS

In his second and current PCR application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "My attorney failed to timely appeal the order of dismissal from my PCR hearing dated October 26, 2017."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

#3 RMB

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application because his prior PCR counsel, Deborah J. Butcher, Esquire, did not timely file his appeal. This allegation is corroborated by the attached affidavits from Ms. Butcher and Mr. Shaffer explaining the failure to timely appeal from the order of dismissal. Pursuant to Austin v. State, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application.

Respondent consents to allow Applicant a belated review of the denial of his PCR application (2013-CP-03-0159). In light of the information provided to this court and the attached affidavit, this Court finds that Applicant did not knowingly and voluntarily waive his right to appeal his first PCR application. Accordingly, this Court grants Applicant a belated review of the denial of post-conviction relief pursuant to Austin v. State, in which he may raise on appeal any issues that were raised and ruled upon in his prior application. In order to secure this review, however, Applicant must appeal from this Order.

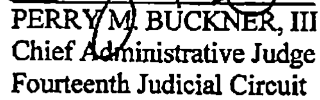
IV. CONCLUSION

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of written notice of entry of this Order to secure appropriate appellate review. His attention is also directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243 of the South Carolina Appellate Court Rules for the appropriate procedures for filing a belated appeal.

IT IS THEREFORE ORDERED:

1. That Applicant be granted an appeal of case 2013-CP-03-0159 pursuant to Austin v. State;
2. That all other PCR allegations are waived and dismissed with prejudice;
3. That Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 15th day of January, 2019.



PERRY M. BUCKNER, III
Chief Administrative Judge
Fourteenth Judicial Circuit

Walterboro, South Carolina

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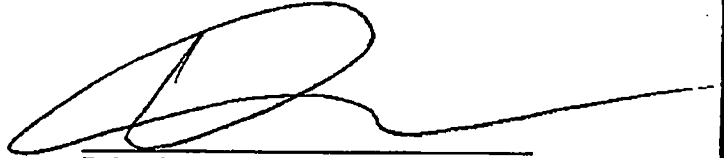
ELAINE GARD
CLERK OF COURT
ALLENDALE COUNTY, S.C.

STATE OF SOUTH CAROLINA) COUNTY OF ALLENDALE)	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Derek Maner, #333244, Applicant, v. State of South Carolina, Respondent.	2018-CP-03-0165 **SIGNATURE PAGE OF CONSENT ORDER GRANTING BELATED REVIEW PURSUANT TO AUSTIN V. STATE[1]**

The consent of both parties to the grant of belated review pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) is confirmed by the below signatures:

Christian Saville, Esq.
Counsel for Respondent



Deborah J. Butcher, Esq.
Counsel for Applicant

[1] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

THE STATE OF SOUTH CAROLINA
In The Supreme Court of South Carolina

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Diane S. Goodstein, Circuit Court Judge

Case No. 2013-CP-03-0159

The State of South Carolina, Respondent,

v.

Derek Maner, Appellant.

PROOF OF SERVICE

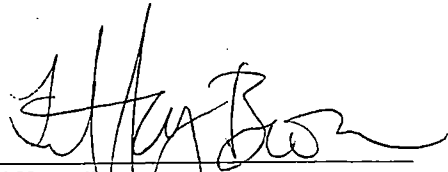
I Certify that I have served the Notice of Appeal on the below listed respondents/ involved parties by depositing a copy of it in the United States Mail, postage paid, on February 18, 2019 addressed to:

The Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

Office of Attorney General
AllenWilson
Post Conviction Relief Division – 4th and 15 Judicial Circuits
Ruston W. Neely, Esquire
Christian Saville, Esquire
1000 Assembly Street
Columbia, South Carolina 29201
Attorney for Respondent

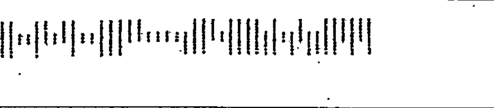
Allendale County Clerk of Court
Elaine Sabb
P.O. Box 126
Allendale, South Carolina 29810-0126

Tristan M. Shaffer
225 Columbia Ave.
Chapin, South Carolina 29036



Tiffany Brown
Paralegal to
Deborah J. Butcher
Attorney for Appellant
P.O. Box 610
Camden, South Carolina 29021
Telephone: 803.432.7599
S.C. Bar No.: 74029

February 18, 2019
Camden, South Carolina



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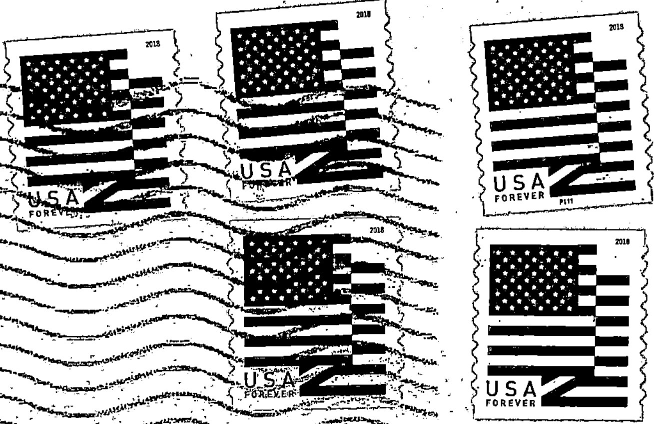

The Supreme Court of
South Carolina
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Columbia SC 29201